FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

THE QUESTION POSED IS PROPERLY BEFORE THIS COURT.

The State of Delaware, for the first time in the brief for Respondent, alleged that the question presently before this court should not be considered because of an alleged deficiency in the motion presented to the Trial Court. Specifically, the Respondent suggested that the Motion to Suppress Evidence and Request

for Hearing did not state sufficiently the grounds upon which it was made.

A. The issue presented by the Respondent is not fairly contained within the question for which Certiorari was granted.

Rule 40(2) of this Court requires that the briefs not raise questions other than those set forth in the Petition for Certiorari. The question before this Court concerns the Trial Court's refusal to admit testimony at the Suppression Hearing and not the propriety of the Trial Court's granting the original motion for such a hearing. The two questions are separate and distinct, the first involving a fundamental question under the United States Constitution and the second involving the administration of Delaware Trial Courts. It is submitted that this Court's Rules and long standing decisions[1] dictate that the Court's consideration be confined to the question for which Certiorari was granted.

B. The action on the part of the Trial Court was fully within the broad discretion afforded by Delaware Statute and the rules of the Superior Court of the State of Delaware since the Respondent was not prejudiced by the ruling.

In the matter raised by the Respondent, the Trial Judge can and should exercise wide discretion, guided by applicable statutes and Court rules. Examination of such statutes and rules indicates that the Trial Court satisfied the letter and spirit of both.

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[1]Johnson v. Manhattan Ry. Co., 53 S. Ct. 721, 727; 289 U.S. 479 (1933).
Republic of France v. French Overseas Corporation, N.Y. 48 S. Ct. 516, 517; 277 U.S. 323 (1928).
United States v. Biwabik Mining Co., 38 S. Ct. 462, 464; 247 U.S. 116 (1918).

Consistent with Delaware law and practice, procedural irregularities should be disregarded unless they substantially prejudice the rights of the party affected. Criminal Rule 52(a) of the Superior Court of the State of Delaware provides for Harmless Error as follows:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Thus, it has been held that harmless error, even though involving constitutional rights, do not require reversal of a conviction[2] and that where the admission of immaterial testimony worked no injury to the plaintiff in error and he was not prejudiced thereby, court will refuse to reverse the judgment of the court below.[3] Moreover, the statute which provides the basis for the Superior Court rules cited by the Respondent provides

> ". . . the provisions herein must be construed according to the fair import of their terms to promote justice and effect the purpose of the law, as stated in §201 of this Criminal Code."[4]

The interpretation urged by the Respondent would be contrary to the specified principles of construction cited above, in that the result would not promote justice and effect the purposes of the law. Both parties at trial as well as the Court were well informed as to the evidence that the Defendant sought to present, since the matter was discussed prior to the hearing [A-14]. Moreover, the argument of this issue at the Suppression Hearing did not find the State of Delaware surprised or unprepared, since the State presented extensive arguments and citations in support of its position [A-17-21]. The Trial Court's hearing of this question was therefore appropriate and not prejudicial to either party.

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[2]Washam v. State, 235 A.2d 279 (Delaware Supreme Court 1967).

[3]Fisher v. State, 41 A. 184 (1898).

[4]11 Delaware Code, §203.

C. Any deficiencies in the original motion for a Suppression Hearing were previously waived.

The Respondent urges that this issue is now raised under the doctrine of plain error. However, the many opportunities that have passed to raise this objection bear testimony against the issue being plain error. The Respondent failed to object to the alleged deficiency at the Suppression Hearing itself, or on appeal to the Delaware Supreme Court, or in reply to the Petition for Writ of Certiorari. The Respondent's total conduct to date is indicative of a waiver of any objection, and no extraordinary prejudice has been shown to justify any exception to the rule that an issue is not preserved for appeal in the absence of timely objection.

Further, as noted at page 4 of the Respondent's brief, a fundamental purpose for the Superior Court Rules cited by the Respondent is the orderly administration of justice. It is submitted that it would be more disruptive to the administration of justice in the State of Delaware for this court to reverse a discretionary ruling by the Trial Court involving no constitutional question but only local procedure.

II.

A DETERRENT EFFECT AGAINST FOURTH AMENDMENT VIOLATIONS WILL BE PROVIDED ONLY BY EXCLUSION OF WILLFUL, RECKLESS AND NEGLIGENT MISSTATEMENTS IN A SEARCH WARRANT APPLICATION.

The Petitioner concurs with the amicus United States in its conclusion that "the knowing or voluntary nature of [a] misrepresentation gives rise to a strong need for deterrence

and . . . promises that the suppression of evidence will tend to have the desired effect of preventing future transgressions."[5] And that "unless this sanction were available, there would be little to discourage unscrupulous police officers from apending untrue allegations to an affidavit in any close case in an effort to sway a hesitant magistrate."[6]

The Petitioner submits the same considerations apply to any untrue statements included in an affidavit which, by reasonable inquiry, would have been shown to be erroneous. The amicus United States adopted the position of the 7th Circuit in United States v. Carmichael[7] in suggesting that the line between innocence and negligence would be difficult to draw and that recklessly made misstatements should result in exclusion of the resulting evidence while negligently made misstatements should not require exclusion. However, even Carmichael acknowledged that negligent misstatements should and theoretically could be deterred,[8] and it is submitted that the distinction between reckless and negligent behavior seems at least as difficult an inquiry, the definitions of one term often including the other. Thus, recklessness has been defined as heedlessness, carelessness or negligence,[9] and negligent has been considered equivalent to reckless.[10]

In the definitions found in the Delaware Criminal Code, "Recklessly" is said to involve knowledge of and disregard for a

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[5]Brief for United States as Amicus Curiae, page 25.

[6]*Ibid.*, page 26.

[7]49 F.2d 983.

[8]*Ibid.*, at 989.

[9]LaMarre v. Cleveland, C., C. & St. L. Ry. Co., 217 Ill. App. 296, 304.

[10]Stout v. Gallemore, 26 P.2d 573, 577 (1933).

risk[11], while "Criminal negligence" involves a failure to perceive.[12] Significantly, however, both definitions require that the conduct "constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

The word negligent is often used to include all conduct which is in reckless disregard of a legally protected interest of others.[13] In the carefully considered writings of Kipperman on the present subject, the word negligent was used in this generic sense, the author recommending the exclusion of all evidence obtained on the basis of allegations that were false, material and negligently made.[14] This is consistent with the concept that both negligence and recklessness involve a degree of culpability which is both preventable and deterrable.

Still another legal scholar, in pointing out that the line between innocence and negligence is more clear than between negligence and recklessness, pointed out that the line between innocence and negligence is one that is commonly drawn:

[11]Delaware Criminal Code, §231(3):

> "Recklessly." A person acts recklessly with respect to an element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

[12]Delaware Criminal Code, §231(4):

> "Criminal negligence." A person acts with criminal negligence with respect to an element of an offense when he fails to perceive a risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

[13]Universal Concrete Pipe Co. v. Bassett, 200 N.E. 843, 847 (1936).

[14]Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harvard Law Review 825 (1971).

> "In thousands upon thousands of lawsuits yearly, juries determine the innocence or negligence of drivers, doctors, government executives, and even law enforcement officers. If it is workable for lay jurors to determine whether a police officer used unreasonable force, surely it is workable for a judge to determine whether an officer was negligent in acquiring or transmitting the information used to invade someone's privacy."[15]

Professor Herman concludes,

> "In our society, government intrusion is a necessary evil - an exception to the right to privacy. As an exception, it must be kept within narrow bounds to protect innocent privacy. That we tolerate non-negligent [innocent] mistakes is already a compromise. To tolerate negligent (and, perhaps, grossly negligent) errors would, in the words of Brinegar, 'leave law-abiding citizens at the mercy of the officers' whim or caprice.' "[16]

The line between negligence and recklessness is, at best, indistinct, and both types of behavior are deplorable and deterrable with respect to false allegations made to obtain a search warrant.

Accordingly, it is respectfully submitted that, for the exclusionary rule to have the desired deterrent effect, all non-innocent material misstatements in a Search Warrant Affidavit should result in the exclusion of evidence obtained pursuant to the warrant.

[15]Herman, Warrants for arrest or search: Impeaching the Allegations of a Facially Sufficient Affidavit, 36 Ohio State Law Journal 721, 750 (1975).

[16]*Ibid.*

III.

THE PRESENT CASE REQUIRES DETERMINATION OF WHETHER RECKLESS, NEGLIGENT OR INNOCENT REPRESENTATIONS REQUIRE EXCLUSION OF THE RESULTING EVIDENCE.

> The amicus American Civil Liberties Union has suggested,
>
> "Because the defendant offered to prove that the police affidavit contained deliberate, intentional, and material misrepresentations, the Court need not decide the Fourth Amendment implications of innocent, negligent, or even reckless misstatements."[17]

While trial counsel did, in fact, intend to produce testimony that would show willful misrepresentations in the Search Warrant Affidavit, the fact remains that neither the testimony itself nor affidavits summarizing the testimony were introduced into the record. Accordingly, this Court's judgment and guidance regarding the full possible spectrum of misstatements, ranging from innocent to willful, is needed for satisfactory resolution of the case, depending on the precise nature of any testimony subsequently introduced.

[17]Brief Amicus Curiae, American Civil Liberties Union Foundation, pages 9-11.

IV.

A REQUIREMENT FOR A PRELIMINARY SHOWING BEFORE A SUPPRESSION HEARING WOULD BE INCONSISTENT WITH ESTABLISHED JUDICIAL PROCEDURE WITH RESPECT TO FOURTH AMENDMENT RIGHTS.

The Respondent[18] as well as the amicus United States[19] have urged that a defendant be required to demonstrate a substantial showing of misstatements before a hearing is granted to show misstatements in a search warrant affidavit. As noted in the Petitioner's opening brief,[20] such a requirement would impose an unreasonable burden on a defendant. Moreover, requiring such a preliminary showing would be inconsistent with the procedure in the enforcement of Fourth Amendment rights regarding searches based on a warrant that is considered insufficient as well as warrantless searches. With challenges to either of the above types of searches, argument or evidence is routinely heard at a suppression hearing. No justification can be seen for requiring extensive preliminary showings in the case of allegations of a false affidavit supporting a search warrant.

One of the more detailed discussions of this matter appears in United States v. Halsey.[21] There, the Court bases a requirement for preliminary showing first on a presumption of truthfulness of the original affiant,[22] usually the police officer, and secondly on the deference that the magistrate's independent assessment of the affidavit should be given.[23] While the complete truthfulness of

[18]Brief for Respondent, pages 11-14.

[19]Brief for the United States as Amicus Curiae, pages 30-33.

[20]Pages 12-14.

[21]357 F. Supp. 1002 (1966).

[22]*Ibid.* at page 1005.

[23]*Ibid.* at page 1006.

police officers and the careful examination of search warrant applications by magistrates are goals devoutly to be wished, their attainment will certainly be expedited by assurance that review of both can easily be had in the routine course of the criminal procedure. Especially in view of the *ex parte* nature of the search warrant hearing and the absence of criminal discovery, a full evidentiary hearing should be available without a cumbersome additional judicial step of a preliminary showing.

Moreover, any requirement for a preliminary showing is likely to become as *pro forma* as search warrant applications themselves, as shown by the offer of proof held sufficient as a preliminary showing in Carmichael:

> "If the witness were allowed to answer my questions with respect to the reliable information, his answers would show that no information had been given at any previous time that led to the arrest or conviction of anybody; that he had prior criminal arrests and criminal convictions, and that there was no basis for his concluding or for this court to conclude that the allegedly reliable informant was a reliable informant."[24]

According, as set forth in the Rules of Criminal Procedure promulgated by this Court, upon motion duly made for return of property or suppression of evidence, the judge should receive evidence on any issue of fact necessary to the decision of the motion[25] without requirement for an extensive preliminary showing before such evidence is given.

In view of the above arguments, taken in conjunction with Petitioner's earlier brief and those of the two amicus curiae, the decision of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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[24] *Supra*, note 7, at page 987.

[25] Rule 41(e).